



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: APRIL 18, 2023

IN THE MATTER OF:

Appeal Board No. 628078

PRESENT: JUNE F. O'NEILL, MARILYN P. O'MARA MEMBERS

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective October 26, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by KINGS HILL FARM LLC prior to October 26, 2022 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed February 7, 2023 (), the Administrative Law Judge overruled the initial determination.

The employer appealed the Judge's decision to the Appeal Board.

Our review of the record reveals that the case should be remanded to hold a hearing. The employer has contended that another reason for the claimant's separation was his failure to enroll in and attend the Substance Abuse Professional ("SAP") program which would have allowed him to continue working in another position pending his return to work upon completing the program. In this regard, the Judge shall conduct a good cause inquiry regarding whether the scope of the misconduct should be amended to include whether the claimant's separation was due to his failure to take the SAP program and/or whether the doctrine of provoked discharge applies because the employer was left with no choice pursuant to federal guidelines but to discharge the claimant due to his failure to take the SAP program after his positive drug test results. Upon a showing of good cause, the judge may consider misconduct



due to positive test results and/or failure to enroll in and attend the SAP program, as well as whether the claimant provoked his own discharge by not enrolling in and attending the SAP program. The Judge shall question the employer about whether the employer notified the Department of Labor regarding the claimant's ability to continue his employment by taking the SAP program and shall confront the parties with page 15 of the hearing packet, specifically question number 16 and the response provided, along with any other relevant correspondence in the file that was provided to the Department of Labor prior to the hearing. If the Judge determines that good cause exists to amend the scope of the hearing, the Judge shall amend the scope following normal procedures. The Judge shall then take further testimony and evidence regarding the details of the SAP program, as well as the relevant statutes and guidelines. Further testimony shall also be taken regarding discussions between the claimant and the employer regarding the SAP program. The employer shall provide additional detail regarding how the claimant would have known about the SAP program and the effect of the program on his employment. The employer should produce the claimant's boss, Joe, to testify regarding conversations he had with the claimant regarding the use of marijuana outside of work, including medicinal use and whether the claimant provided him with a copy of a medical marijuana card. The claimant should produce a medical marijuana card or proof of a prescription for the use of marijuana, specifically in effect during the period of October 19, 2022, when the claimant was tested, through October 26, 2022, the date of the positive test results.

Now, based on all of the foregoing, it is

ORDERED, that the decision of the Administrative Law Judge be, and the same hereby is, rescinded; and it is further

ORDERED, that the case shall be, and the same hereby is, remanded to the Hearing Section to hold a hearing on the issue, upon due notice to all parties and their representatives; and it is further

ORDERED, that the hearing shall be conducted so that there has been an opportunity for the above action to be taken, and, so that at the end of the hearing, all parties will have had a full and fair opportunity to be heard; and it is further

ORDERED, that an Administrative Law Judge shall render a new decision, on the



issue, which shall be based on the entire record in this case, including the testimony and other evidence from the original and the remand hearings, and which shall contain appropriate findings of fact and conclusions of law.

JUNE F. O'NEILL, MEMBER

MARILYN P. O'MARA, MEMBER